

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:WR:PNW:HON:TL-N-2382-00

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date: MAY 10 2000

to: Janet Nakasone, Revenue Agent, Exam Group 1304
Examination Branch III, Honolulu

thru: Danford Nikaido, Team Coordinator
Ernest Iwata, Case Manager

from: Pacific-Northwest District Counsel
Jonathan J. Ono, Attorney, Honolulu

subject: Applicability of Mitigation Provisions -
[REDACTED]

DISCLOSURE STATEMENT

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Reference is made to your memorandum, dated April 11, 2000, that requested our assistance regarding the above-subject matter. Specifically, you requested our opinion as to whether the mitigation provisions under I.R.C. §§ 1311, et seq., would authorize your contingent adjustment to the net operating loss (NOL) carry-forward claimed by [REDACTED] ([REDACTED]) to its [REDACTED] taxable year after the expiration of the statutory assessment period for said year. Under the circumstances described in your memorandum, we believe the NOL adjustment for [REDACTED] would constitute an authorized adjustment under § 1312(2) of the mitigation provisions.

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Factually, [REDACTED] sustained a NOL for its [REDACTED] taxable year in the amount of \$[REDACTED] that was carried forward and fully deducted in [REDACTED]. Subsequently, [REDACTED] filed an amended [REDACTED] return that claimed an NOL carry-back in the amount of \$[REDACTED] from [REDACTED] to [REDACTED]. However, no corresponding amended return was filed to reduce the originally claimed NOL carry-forward to [REDACTED]. Currently, [REDACTED]'s [REDACTED] return is being considered by the Appeals division and you intend to fully disallow the NOL carry-back to [REDACTED] as a part of your current examination of the [REDACTED] claim. The current statutory period for assessment on [REDACTED]'s [REDACTED] return expires on [REDACTED]. In the event any portion of the taxpayer's NOL carry-back to [REDACTED] is ultimately allowed (i.e., via administrative Appeals settlement or refund litigation), [REDACTED] would obtain a double deduction on its claimed NOL carry-forward to [REDACTED] unless a corresponding adjustment is made to the latter year.

The circumstances described above appear to be covered by the mitigating provision that permit IRS adjustments to taxable years that would otherwise be barred by the assessment statute in situations that result in a "double allowance of a deduction" to the taxpayer. I.R.C. § 1312(2). In a case presenting similar circumstances to the instant situation, the Tax Court has held that the provisions of §§ 1311-1314 were applicable. Bolten v. Commissioner, 95 T.C. 397 (1990).

In the Bolten case, the taxpayers had incurred a NOL of approximately \$780,000.00 in 1976 and carried it forward to 1977, 1978, 1979, 1980, and 1981 in the approximate amounts of \$56,000.00, \$77,000.00, \$175,000.00, \$460,000.00, and \$8,000.00, respectively. Subsequently, after the statutory assessment period for the 1980 taxable year had expired, the IRS and the Boltens entered into a closing agreement for the years 1977-1979 that resulted in increased taxable income for these years and a consequential re-ordering of the NOL carry-forwards that resulted in \$720,000.00 of the NOL being absorbed in these years. In attempting to assess the deficiency that resulted for 1980 as a result of the closing agreement (i.e., \$460,000.00 - \$60,000.00 = \$400,000.00), the Service argued that the mitigation provisions under §§ 1311, et seq., applied.

¹We note that a pen and ink change was made on your memo indicating that the assessment statute expiration date (ASED) is [REDACTED]. If this later date is accurate, and a final resolution of the taxpayer's [REDACTED] claim can be completed prior to this later date, the mitigation provisions discussed herein would not be implicated.

In holding for the IRS, the Tax Court stated:

It seems clear to us that this case is fairly covered by the mitigation provisions. The parties are in agreement that the closing agreement is a "determination" as defined in section 1313(a)(2), and that if the mitigation provisions are applicable the amount of the "adjustment" was correctly computed under section 1314. Also, the parties are further in agreement that the authorized correction of the inconsistent treatment must relate to the same "item." In our judgment, that item involves the 1976 NOL and the portions thereof that are used up as it is carried from year to year. More specifically, it involves that portion, [\$460,000], that was carried over to 1980. However, the authoritative "determination," i.e., the closing agreement, by increasing the amounts of the 1976 NOL carryover to 1977, 1978, and 1979, makes clear that the amount of the carryover (of the same 1976 NOL) to 1980 is only [\$60,000]. In short, the closing agreement "determined" increases in the 1977-1979 NOL carryover losses, and such increases were the very items, or rather portions of the same item, that made erroneous the [\$460,000] carryover to 1980 to the extent that it exceeded [\$60,000]. The adjustment authorized by section 1314 does no more than recompute petitioners' 1980 tax so as to eliminate the excessive (erroneous) portion of the 1980 NOL carryover deduction, and the Commissioner's determination of deficiency simply incorporates that adjustment. We think it is sound. [Emphasis added.]

Bolten, supra, at 404-405.

Similarly, in the instant case, the ultimate disposition of ■■■'s ■■■ refund claim, either by administrative settlement or refund litigation, would be considered a "determination" under §§ 1313(a)(3) or (a)(1), respectively. Further, as in the Bolten case, the adjustment to ■■■'s ■■■ tax (i.e., the reduction in the amount of the NOL carry-forward from ■■■), would relate to the same "item" that is the subject of this "determination," (i.e., the extent to which the ■■■ NOL may be carried back to ■■■). Accordingly, we believe that the mitigation provisions would permit the IRS' determination and assessment of a deficiency for ■■■ after the ASER pursuant to § 1314(a).

If you have any further questions regarding this matter, please contact me at ext. 2879.

/s/ JONATHAN J. ONO
JONATHAN J. ONO
Attorney